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1995]

Issues in the Third Circuit

BANKING LAW—*HUDSON UNITED BANK V. CHASE MANHATTAN BANK, N.A.*: THE THIRD CIRCUIT DECIDES THAT FIRREA'S VENUE PROVISION APPLIES TO CLAIMS AGAINST THE RECEIVER

I. INTRODUCTION

In the summer of 1989, and in the face of a growing savings and loans crisis, President Bush signed into law the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA).¹ Considered by many to be a bailout statute for failed depository institutions, Congress enacted FIRREA to rectify existing problems in the thrift industry and establish "a new era for insured institutions and their regulators."² FIRREA granted power to certain regulatory agencies, under the auspices of the Federal Deposit Insurance Corporation (FDIC), to assume control of a large number of failing savings and loans.³ FIRREA has given rise to a number of legal issues, including whether FIRREA preempts the FDIC's federal common law claim against bank officers for simple negligence; whether FIRREA requires a plaintiff suing a failed institution to exhaust the FDIC's administrative remedies before commencing litigation; and whether federal courts possess exclusive jurisdiction to hear claims against a failed institution.⁴

1. Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at various sections of titles 12 and 15 U.S.C. (Supp. V 1993)).

2. See H.R. REP. NO. 54, 101st Cong., 1st Sess. 291 (1989), *reprinted in* 1989 U.S.C.A.N. 86, 87 [hereinafter House Report] (abolishing Federal Savings and Loan Insurance Corporation and transferring duties of the Federal Home Loan Bank Board to Federal Deposit Insurance Corporation (FDIC), Office of Thrift Supervision, Federal Housing Finance Board or Resolution Trust Corporation).

3. See Anthony C. Providenti, Jr., Note, *Playing With FIRREA, Not Getting Burned: Statutory Overview of the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, 59 FORDHAM L. REV. S323, S324-35 (1991) (noting FIRREA's multifaceted goals: establish control and oversight of each institution, promote confidence in the industry, maintain customer services, evaluate each institution's condition through identifying and accounting for all losses, ensure that each institution is operated in safe, sound manner, and recommend most viable alternatives for cost effective resolution in each thrift case).

4. See *Federal Deposit Ins. Corp. v. Bates*, 42 F.3d 369, 370 (6th Cir. 1994) (holding FIRREA's gross negligence standard abrogates federal common law action of simple negligence against bank officers); *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 39 F.3d 292, 296 (11th Cir. 1994) (holding that FIRREA's administrative procedures must be exhausted before commencing litigation against failed institution); *Carney v. Resolution Trust Corp.*, 19 F.3d 950, 955 (5th Cir. 1994) (same); *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 484 (8th Cir. 1993) (same); *Marquis v. Federal Deposit Ins. Corp.*, 965 F.2d 1148, 1151 (1st Cir. 1992) (same); *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 395 (3d Cir.), *cert.*

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In *Hudson United Bank v. Chase Manhattan Bank*,⁵ the United States Court of Appeals for the Third Circuit addressed FIRREA's venue provision, codified at 12 U.S.C. § 1821(d)(6)(A). This provision allows anyone raising a claim against a failed depository institution (for which the FDIC is receiver) to file suit in the district where the depository institution is located or in the United States District Court for the District of Columbia.⁶ In *Hudson United Bank*, the Hudson United Bank (Hudson) contended that the venue provision applied only to claims against the depository institution, rather than to those claims against the receiver itself.⁷ However, the Third Circuit concluded that the venue provision applied to claims against both the receiver *and* against the failed depository institution.⁸

This Casebrief will analyze the issues surrounding FIRREA and its impact on litigants with claims against failed depository institutions. Part II of this Casebrief offers a concise background of the savings and loan crisis and the subsequent enactment of FIRREA.⁹ Part III presents the facts and procedural history of *Hudson United Bank v. Chase Manhattan Bank*.¹⁰ Part IV of this Casebrief analyzes the Third Circuit's decision to apply the venue provision of FIRREA to claims against the receiver.¹¹ Finally, Part V

denied, 112 S. Ct. 582 (1991) (same); *see also* Holmes Financial Associates, Inc. v. Resolution Trust Corp., 33 F.3d 561, 567 (6th Cir. 1994) (noting that state courts retain jurisdiction over pre-receivership claim). *But cf.* Lloyd v. Federal Deposit Ins. Corp., 22 F.3d 335, 337 (1st Cir. 1994) (noting that federal courts have exclusive jurisdiction over post-receivership claims); Mansolillo v. Federal Deposit Ins. Corp., 804 F. Supp. 426, 428 (D.R.I. 1992) (same).

5. 43 F.3d 843 (3d Cir. 1994).

6. 12 U.S.C. § 1821(d)(6)(A) (Supp. V 1993). Section 1821(d)(6)(A) reads:

Before the end of the 60-day period beginning on the earlier of —

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the [FDIC] is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i), the claimant may request administrative review of the claim . . . or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

Id.

7. *Hudson United Bank*, 43 F.3d at 845. For a discussion of Hudson's arguments on appeal and how the court addressed them, see *infra* notes 61-95 and accompanying text.

8. *Id.* at 849-50. For a discussion of how the court arrived at its holding, see *infra* notes 61-95 and accompanying text.

9. For a brief overview of the savings and loan crisis and the enactment of FIRREA, see *infra* notes 13-40 and accompanying text.

10. For the facts and procedural history of *Hudson United Bank*, see *infra* notes 41-60 and accompanying text.

11. For a discussion of the Third Circuit's opinion in *Hudson United Bank*, see *infra* notes 61-95 and accompanying text.

concludes with a discussion of *Hudson United Bank's* practical ramifications and legal consequences.¹²

II. BACKGROUND

A. Crisis of the 1980s

The collapse of the thrift industry in the United States during the 1980s has been described as an "awful story"¹³ and "disaster."¹⁴ Estimates of the collapse's total cost to taxpayers exceed \$1 trillion.¹⁵ The savings and loan collapse remains subject to debate because its cause is an enigma that does not lead to simple answers. Nevertheless, certain important factors concerning the collapse highlight the debate and help define its parameters.

Traditionally, savings and loans associations generated income from the spread between the revenues they gained from fixed, long term mortgages and the interest paid on deposits.¹⁶ In 1966, Congress enacted legis-

12. For a discussion of the practical ramifications and legal consequences of the *Hudson United Bank* decision, see *infra* notes 96-106 and accompanying text.

13. Lawrence J. White, *The S & L Debacle*, 59 FORDHAM L. REV. 557, 557 (1991). From 1980 to 1988, over 500 savings and loans failed, a total that represents more than three-and-a-half as many in the previous 45 years combined. S. REP. NO. 19, 101st Cong., 1st Sess. 2 (1989).

14. Carl Felsenfeld, *The Savings and Loan Crisis*, 59 FORDHAM L. REV. 57, 58 (1991).

15. *Id.* at S29. The actual expense has been calculated at \$130 billion to \$170 billion, but because the financing is with 30 to 40-year bonds, interest payments will continue until the year 2030, making the total cost \$1 trillion. *Id.* at S29 n.144; see House Report, *supra* note 2, at 502, reprinted in 1989 U.S.C.C.A.N. at 297 (commenting that official calculations are understated). Congressman John LaFalce expressed his concern about the cost prior to FIRREA's enactment:

The Administration cites the overall cost of the plan at approximately \$90 billion. But, the cost estimates are understated and the economic assumptions that underlie them [are] overly optimistic.

An analysis provided by the House Banking Committee staff suggests that the total cost of the Administration plan, before subtracting estimated revenues, will be approximately \$335 billion

There are several reasons that the Administration's estimate is so low. First of all, the Administration's plan calls for the issuance of 30-year REFCO bonds. However, the Administration has largely focused on present value costs and paid too little regard to the interest over time on the additional debt we are incurring. This understates the real cost.

In contrast, Committee staff projections are based on the assumption that the new REFCO bonds, like the earlier FICO bonds, will be based on a 30-year schedule. Under the plan, the interest costs over time fall primarily on the taxpayer. It is this cost that will be a continuing drain on the average citizen and our economy, and that will necessitate additional constraints on spending for other important government programs.

Id.

16. Paul T. Clark et al., *Regulation of Savings Associations Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 BUS. LAW. 1013, 1019 (1990); see Felsenfeld, *supra* note 14, at S13. Felsenfeld notes that deposits still remain the major source of funds for savings and loans. *Id.* However, where S&L

lation subjecting savings associations to interest rate ceilings on deposits.¹⁷ As a result, during the late 1970s and early 1980s, many depositors moved their funds from savings associations when the prevailing interest rates rose above what the savings and loans could pay.¹⁸ To enable the savings and loan institutions to compete, Congress enacted the Depository Institutions Deregulation and Monetary Control Act of 1980, which removed the artificial constraints upon what savings associations could pay on deposits.¹⁹ However, savings associations began paying more for deposits than what they were earning on their mortgage portfolios.²⁰

In response to this dilemma, Congress and many states began loosening the investing and lending restraints on savings and loans.²¹ Consequently, the management of many savings and loan institutions began to pursue aggressive lending and investing strategies, many of which backfired.²² At the same time, regulatory oversight of savings associations lessened, allowing for fraud and abuse to occur at savings and loan institutions lacking strong management controls.²³ While the exact cause of the savings and loan collapse remains largely unclear, it may be partly attributed to a combination of factors, including: rising interest rates, thrift industry deregulation, depression of the real estate market, and internal fraud and mismanagement at many savings and loan institutions.²⁴

deposits were once considered long term in nature, they are now considered short term, subjecting the savings accounts to a "high degree of interest rate risk." *Id.*

17. The Federal Reserve System's Regulation Q codified the ceilings. See 12 C.F.R. § 217.7 (1977).

18. Clark et al., *supra* note 16, at 1019; see Felsenfeld, *supra* note 14, at S16 (noting that "S&L's could not hope to retain their deposits if their regulator-established ceilings became misaligned with market rates").

19. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 202, 94 Stat. 132, 142 (1980) (codified at 12 U.S.C. § 3501(a) (1988)).

20. See Clark et al., *supra* note 16, at 1019-20. The only way for savings and loans to compete for funds was to offer higher rates than their competitors, among whom were banks and money market mutual funds. *Id.* at 1020. As a result, the S&Ls began paying more for deposits than what they were earning on their long term mortgages. *Id.*

21. See Garn-St. Germain Depository Institution Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982). The Act allowed savings and loans greater discretion in their investing and lending practices. *Id.*

22. Felsenfeld, *supra* note 14, at S33-34. Professor Felsenfeld noted: [i]t is generally agreed that the S&Ls were mismanaged. Simple incompetence by inexperienced operators mixed with fraud resulted in badly conceived loans and investments, loans to officers and directors, sweetheart loans to affiliated businesses, cooking the books, bribery and outright embezzlement. These occurred in varying measures. The size of the various peccadillos is difficult to determine On the accumulated evidence, it is undeniable that internal fraud and mismanagement contributed substantially to the S&L failures.

Id. at S34.

23. Clark et al., *supra* note 16, at 1022.

24. See Felsenfeld, *supra* note 14, at S41-S49. Professor Felsenfeld argues that the collapse was due to a combination of the following factors: the disparity be-

B. *Congress Enacts FIRREA*

In 1989, Congress enacted FIRREA with the hope that it would represent a "new era for insured institutions and their regulators."²⁵ Among the purposes of FIRREA was the goal of providing affordable housing finance and opportunities to low and moderate-income individuals. Congress hoped to accomplish this goal by improving the management of federal housing credit programs and resources and "establish[ing] organizations and procedures to obtain and administer the necessary funding to resolve the failed thrift cases and to dispose of the assets of these institutions."²⁶ Congress' evident desire to restructure the responsibility for regulating savings associations was a central feature of FIRREA.²⁷

tween the cost of deposits and the rate of return of mortgage portfolios beginning in the 1970s when interest rates soared, the low premium the federal deposit insurance system set which did not reflect the riskiness of the investments of institutions, the accounting gimmicks used by institutions which concealed their low net worth, the depression in the real estate market, decreasing the percentage of thrift portfolios in mortgages, the unwise use of the expanded powers Congress and the states gave to savings associations in the early 1980s, mismanagement and internal fraud, an uncontrolled state system, which granted even greater powers to the S&Ls, and inadequate regulation. *Id.*; cf. Clark et al., *supra* note 16, at 1022. Clark notes:

The precise causes of the thrift industry crisis will undoubtedly be the subject of much debate in the coming years. The factors most commonly cited by members of Congress during the deliberations leading to the passage of [FIRREA] include the rising interest rate environment of the 1970s and early 1980s, the extensive deregulation of the thrift industry at both the federal and state levels during the 1980s, the failure of the Bank Board and state regulators to properly supervise savings associations, the economic downturn in the Southwest, and managerial incompetence and outright fraud by the operators of many thrift institutions.

Id.

25. House Report, *supra* note 2, at 291, *reprinted in* 1989 U.S.C.C.A.N. at 87. Congress sought to "restore public confidence in the savings and loans industry in order to ensure a safe, stable, and viable system of affordable housing finance." *Id.* at 307, *reprinted in* 1989 U.S.C.C.A.N. at 103.

26. *Id.* at 307, *reprinted in* 1989 U.S.C.C.A.N. at 103. Congress also sought to: establish a distinction between the regulatory and insurance functions of the thrift industry by (1) ensuring a well capitalized and independent thrift insurance fund, (2) enhancing thrift industry regulation by providing for stronger supervisory oversight of the industry under the Department of the Treasury; establish stronger capital standards for thrifts; and, enhance the regulatory enforcement powers of the depository institution regulatory agencies to protect against fraud, waste and insider abuse. *Id.* at 307-08, *reprinted in* 1989 U.S.C.C.A.N. at 103-04.

27. See 12 U.S.C. § 1811 (Supp. V 1993). Congress spelled out the purposes of FIRREA:

- (1) To promote, through regulatory reform, a safe and stable system of affordable housing finance.
- (2) To improve the supervision of savings associations by strengthening capital, accounting, and other supervisory standards.
- (3) To curtail investments and other activities of savings associations that pose unacceptable risks to Federal deposit insurance funds.

One major change in this effort involved the enhancement of the FDIC's powers.²⁸ The FDIC is responsible for insuring deposits of savings associations.²⁹ Although the FDIC is not the primary regulator of savings associations, FIRREA enhanced its regulatory powers, including its power to act as a conservator or receiver.³⁰ Specifically, § 1821(d) of 12 U.S.C. grants the FDIC its powers as conservator or receiver of failed institutions.³¹ Moreover, § 1821(d) gives the FDIC a broad range of authority in its activities as receiver and conservator.³² For example, FIRREA granted

(4) To promote the independence of the Federal Deposit Insurance Corporation from the institutions the deposits of which it insures, by providing an independent board of directors, adequate funding, and appropriate powers.

(5) To put the Federal deposit insurance funds on a sound financial footing.

(6) To establish an Office of Thrift Supervision in the Department of the Treasury, under the general oversight of the Secretary of Treasury.

(7) To establish a new corporation, to be known as the Resolution Trust Corporation, to contain, manage, and resolve failed savings associations.

(8) To provide funds from public and private sources to deal expeditiously with failed depository institutions.

(9) To strengthen the enforcement powers of Federal regulators of depository institutions.

(10) To strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors.

Id.

28. See 12 U.S.C. §§ 1811-1834 (Supp. V 1993). Section 1811 reads: "[t]here is created a Federal Deposit Insurance Corporation . . . which shall insure, as hereinafter provided, the deposits of all banks and savings associations which are entitled to the benefits of insurance under this chapter, and which shall have the powers hereinafter granted." *Id.*

29. Clark et al., *supra* note 16, at 1026. FIRREA created a new fund, the Savings Association Insurance Fund (SAIF), from which the FDIC obtains funding for savings associations that were not insured by the Federal Savings and Loan Insurance Corporation (FSLIC). *Id.* The FSLIC became insolvent in meeting its obligations to depositors of failed thrifts. *Id.* at 1013-14.

30. *Id.* at 1026.

31. 12 U.S.C. § 1821(d) (Supp. V 1993).

32. See House Report, *supra* note 2, at 330-31, reprinted in U.S.C.C.A.N. at 126-27. Congress stated:

the authority includes the power as conservator to conduct business, including taking deposits, and performing all functions of the financial institution in its own name; to take necessary action to put the institution in sound and solvent condition; as receiver to merge the institution with another insured financial institution; to organize a Federal savings association to take over assets and liabilities from a failed thrift, or to organize a bridge bank or a new national bank to take over assets and liabilities of any insured financial institution; to transfer assets or liabilities of the financial institution, including those associated with any trust business carried on by the institution, without any further approvals; and to determine claims; and to exercise all powers and authorities granted by the Act or incidental thereto.

Id.

the FDIC the ability to determine claims³³ and also established claims procedures in cases where the FDIC is appointed receiver.³⁴

Since Congress enacted FIRREA in 1989, the Third Circuit has addressed the topic of § 1821(d) and its claims procedures several times. First, in *Rosa v. Resolution Trust Corp.*,³⁵ the Third Circuit held that the jurisdictional bar of § 1821(d)(13)(D) applied to claims against the receiver as well as the failed depository institution, and that the jurisdictional bar applied to claims against the institution after the institution had entered receivership.³⁶ In addition to the Third Circuit's holding in *Rosa*, the court also held in both *Praxis Properties v. Colonial Savings Bank*³⁷ and *Althouse v. Resolution Trust Corp.*³⁸ that FIRREA mandates that administrative claims procedures must be exhausted before the judiciary takes any action.³⁹ However, the Third Circuit, before its holding in *Hudson United Bank*, never directly addressed whether the venue provision of § 1821(d)(6)(A) applies in cases against the receiver.⁴⁰

III. FACTS AND PROCEDURAL HISTORY

In 1987, Citytrust, a state bank licensed in Connecticut, extended a \$1.25 million line of credit and a \$1 million term loan to Kleinberg Electric, a New York corporation.⁴¹ Hudson, a New Jersey corporation, then purchased a sixty-three percent participation in the term loan from Citytrust pursuant to their Loan Participation Agreement.⁴² Citytrust eventually went bankrupt, and was placed under the FDIC's control as Receiver

33. 12 U.S.C. § 1821(d)(3) (Supp. V 1993).

34. *Id.* § 1821(d)(5). For a general discussion of the powers and duties of the FDIC, see House Report, *supra* note 2, at 331, *reprinted in* 1989 U.S.C.C.A.N. at 127.

35. 938 F.2d 383 (3d Cir. 1991).

36. *Id.* at 392-94. In *Rosa*, the plaintiff argued that the jurisdictional bar of § 1821(d)(13)(D) did not apply to claims against an institution that arise once a conservator or receiver is appointed for that institution. *Id.* at 392. The court rejected this claim, holding that the language of § 1821(d)(13) did not apply solely to "pre-takeover" institutions. *Id.* at 392-93.

37. 947 F.2d 49 (3d Cir. 1991).

38. 969 F.2d 1544 (3d Cir. 1992).

39. *Althouse*, 969 F.2d at 1545-46; *Praxis*, 947 F.2d at 63-64. *Althouse* also held that if a claimant fails to file a timely claim, then the claimant is barred from seeking any judicial action. *Althouse*, 969 F.2d at 1545-46. Under § 1821(d), judicial action includes declaratory judgments. *National Union Fire Ins. Co. v. City Sav., FSB*, 28 F.3d 376, 381 (3d Cir. 1994).

40. For a further discussion of *Hudson United Bank*, see *infra* notes 41-95 and accompanying text.

41. *Hudson United Bank v. Chase Manhattan Bank, N.A.*, 832 F. Supp. 881, 882-83 (D.N.J. 1993).

42. *Id.* at 883. Plaintiff Hudson United Bank is the successor in interest to HUB National Bank, formerly known as Meadowlands National Bank. *Id.* at 882. The Loan Participation Agreement is an asset that at the time of the district court's opinion amounted to 10% of Hudson's capital. *Id.* at 883.

in August of 1991.⁴³ The FDIC sought a buyer for Citytrust and subsequently entered into a Purchase and Assumption Agreement with Chase Manhattan Bank (Chase), which allowed Chase to "put" any unwanted assets back into the Receiver.⁴⁴ Thereafter, the FDIC appointed Consolidated Asset Recovery Corporation (CARC), a Chase subsidiary, to manage (with FDIC supervision) the pool of Citytrust assets the FDIC retained or reacquired pursuant to the "put" provisions of the Purchase and Assumption Agreement.⁴⁵

Shortly after Citytrust's bankruptcy declaration in August of 1991 and the beginning of its new arrangement with CARC, Hudson stopped receiving payments from the Kleinberg loan.⁴⁶ Furthermore, Chase terminated the Kleinberg line of credit, apparently upon the closing of the FDIC's Purchase and Assumption Agreement.⁴⁷ Two months later, Chase "put" the Kleinberg loans back to the FDIC so that CARC could manage them.⁴⁸

43. *Id.* at 883. The FDIC was appointed receiver pursuant to 12 U.S.C. § 1821(c)(2)(ii), which reads, in relevant part: "[t]he [FDIC] shall be appointed receiver, and shall accept such appointment, whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution or District bank" 12 U.S.C. § 1821(c)(2)(ii) (Supp. V 1993).

44. *Hudson United Bank*, 832 F. Supp. at 883. Section 1821(d) lists the powers of the FDIC as receiver. 12 U.S.C. § 1821(d)(2)(E). In particular, § 1821(d)(2)(E) states that "the [FDIC] may . . . , as receiver, place the insured depository institution in liquidation and proceed to realize on the assets of the institution" *Id.* § 1821(d)(2)(E).

Another option, which the FDIC chose here, is to enter into a "Purchase and Assumption" agreement with a healthy bank. *Id.* § 1823(c)(2). Under a "Purchase and Assumption Agreement," the FDIC as receiver of the failed bank sells the failed bank's "good assets" to a sound, insured bank, in exchange for that bank's promise to pay the failed bank's depositors. *Federal Deposit Ins. Corp. v. La Rambla Shopping Center, Inc.*, 791 F.2d 215, 218 (1st Cir. 1986). The FDIC sells its remaining "bad assets" to the FDIC itself, in its corporate capacity. *Id.* The FDIC in its corporate capacity pays the FDIC as receiver for the "bad assets," and the receiver in turn pays the healthy bank enough money to make up the difference between what the healthy bank must pay the depositors and what the healthy bank paid for the failed bank's "good assets" and "good will." *Id.* The FDIC in its corporate capacity then does its best to sell the "bad assets," turning over any money realized to the FDIC as receiver for payment to the failed bank's creditors. *Id.* Note that the FDIC assumes two distinct legal identities: (1) as receiver, and (2) as purchaser in its corporate capacity. See *Federal Deposit Ins. Corp. v. Merchants Nat'l Bank of Mobile*, 725 F.2d 634, 638 (11th Cir.), *cert. denied*, 469 U.S. 829 (1984) (noting two distinct legal identities of FDIC); *Federal Deposit Ins. Corp. v. Citizens Bank & Trust*, 592 F.2d 364, 366 (7th Cir.), *cert. denied*, 444 U.S. 829 (1979) (same). See generally, Marie T. Reilly, *The FDIC as Holder in Due Course*, 1992 COLUM. BUS. L. REV. 165, 171 (describing two capacities of FDIC).

45. *Hudson United Bank*, 832 F. Supp. at 883. For a brief explanation of a "Purchase and Assumption" agreement, see *supra* note 44.

46. *Id.*

47. *Id.* For a brief explanation of a "Purchase and Assumption" agreement, see *supra* note 44.

48. *Id.* Chase determined that the Kleinberg loans were poor credit risks. *Id.*

By November of 1991, Hudson inquired about the status of the Kleinberg term loan and was informed of Citytrust's failure for the first time.⁴⁹ During the same period, CARC accelerated the Kleinberg loans, forcing Kleinberg to file for bankruptcy protection under chapter eleven of the Bankruptcy Code.⁵⁰ Although Kleinberg continued to make payments to CARC on its debts for the Citytrust loans, CARC allegedly failed to pay Hudson its fair share of these payments.⁵¹ By November of 1991, Hudson appeared to be losing money on the Kleinberg loan participation.⁵² In March of 1992, Chase deposited \$476,176.80 into an account Hudson maintained at Chase, and Hudson withdrew the money as payment in full of the loan participation.⁵³ Chase then decided that it had mistakenly deposited the money, and asked the bank to return the deposited funds.⁵⁴ Hudson subsequently filed a claim in the United States District Court for the District of New Jersey, seeking a declaratory judgment concerning its rights to the deposited funds.⁵⁵ Chase filed a counterclaim requesting the return of the funds.⁵⁶

After filing its complaint, Hudson asked the FDIC receiver whether administrative review was a prerequisite to bringing suit.⁵⁷ In its response, the FDIC forwarded a claim notice to Hudson, and Hudson filed its claim on April 15, 1993.⁵⁸ The FDIC denied the claim and moved to transfer the claim to the District of Connecticut.⁵⁹ The district court granted the FDIC's motion to transfer, and certified for interlocutory appeal the issue of whether the District Court of New Jersey was the proper venue for the action.⁶⁰

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* Hudson filed the claim on August 19, 1992, alleging the following: breach of the Loan Participation Agreement, breach of the duty of good faith, breach of fiduciary duty and fraudulent concealment. *Id.* at 883-84. Hudson charged that the FDIC breached its duty of good faith because it failed to advise Hudson of Citytrust's failure and the termination of the Kleinberg's line of credit, and by acting in its own self interest "to the detriment of" Hudson. *Id.* at 883.

56. *Id.* at 884.

57. *Id.*

58. *Id.*

59. *Id.* The FDIC moved to transfer pursuant to 28 U.S.C. § 1406(a), which reads: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a) (1988).

60. Hudson United Bank v. Chase Manhattan Bank, 43 F.3d 843, 845-46 (3d Cir. 1994).

IV. DISCUSSION

A. *Interpreting FIRREA's "Impenetrable Thicket"*⁶¹

The Third Circuit attempted to settle two interrelated issues in *Hudson United Bank*: (1) whether FIRREA's venue provision governs only actions against the depository institution and not the receiver; and (2) whether the claims procedures established in FIRREA cover actions against the receiver *and* actions against the failed depository institution.⁶² The resolution of both issues depends largely on statutory interpretation.⁶³

Hudson argued on appeal that § 1821(d)(6)(A) and its venue provision should be read literally, and because § 1821(d)(13)(D) provides specifically for claims against the receiver, and § 1821(d)(6)(A) does not, the venue provision of § 1821(d)(6)(A) does not apply to actions against the receiver.⁶⁴ The Third Circuit, however, agreed with the district court's

61. *Marquis v. Federal Deposit Ins. Corp.*, 965 F.2d 1148, 1151 (1st Cir. 1992).

62. *Hudson United Bank*, 43 F.3d at 844; *see* 12 U.S.C. § 1821(d)(6)(A) (Supp. 1993) (venue provision); 12 U.S.C. § 1821(d) (claims procedures).

Because the plaintiff filed in federal court, the issue of whether FIRREA grants federal courts *exclusive* jurisdiction did not arise in *Hudson United Bank*. Section 1821(d)(6)(A) states, in relevant part:

[T]he claimant may request administrative review of the claim . . . or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

12 U.S.C. § 1821(d)(6)(A) (emphasis added). Most courts hold that an action commenced in state court before the receiver takes over the failed institution *can* continue in state court. *See, e.g.,* *Guidry v. Resolution Trust Corp.*, 790 F. Supp. 651 (E.D. La. 1992) (holding that parties can maintain claims in state courts); *Coston v. Gold Coast Graphics, Inc.*, 782 F. Supp. 1532, 1534-35 (S.D. Fla. 1992) (same); *Robbins v. Foothill Nissan*, 28 Cal. Rptr. 2d 190, 197 (Ct. App. 1994) (same); *Armstrong v. Resolution Trust Corp.*, 623 N.E.2d 291, 295-96 (Ill. 1993) (same); *Berke v. Resolution Trust Corp.*, 483 N.W.2d 712, 714-15 (Minn. Ct. App. 1992) (same); *Resolution Trust Corp. v. Binford*, 844 P.2d 810, 816 (N.M. 1992) (same); *Herbst v. Resolution Trust Corp.*, 607 N.E.2d 440, 444 (Ohio 1993) (same). However, if a claim arises after the receiver takes over, courts hold that federal courts have exclusive jurisdiction. *See* *Lloyd v. Federal Deposit Ins. Corp.*, 22 F.3d 335, 336 (1st Cir. 1994) (noting that federal courts have exclusive jurisdiction over post-receivership claims); *Mansolillo v. Federal Deposit Ins. Corp.*, 804 F. Supp. 426, 428 (D.R.I. 1992) (same).

63. *See* *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 706 (1st Cir. 1992) ("[T]he task of interpretation begins with the text of the statute itself, and statutory language must be accorded its ordinary meaning."); *Hellon & Associates, Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992) ("[I]f statutory language is clear, we need look no further than that language itself in determining the meaning of the statute."). Determining FIRREA's ordinary meaning, however, has proven to be no easy task. *See Hudson United Bank*, 43 F.3d at 849 ("FIRREA is awkwardly written and difficult to interpret."); *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 486 (8th Cir. 1993) ("FIRREA is not a model of statutory clarity.").

64. *Hudson United Bank*, 43 F.3d at 847; *see* 12 U.S.C. §§ 1821(d)(6)(A), 1821(d)(13)(D) (Supp. V 1993).

reasoning, looking to the other sections of FIRREA detailing the claims procedures that help interpret the venue provision of § 1821(d)(6)(A).⁶⁵

The Third Circuit, further accepting the district court's reasoning, noted that § 1821(d)(6)(A) must be linked to § 1821(d)(5)(A) because § 1821(d)(6)(A) expressly refers to § 1821(d)(5)(A).⁶⁶ If one concludes that § 1821(d)(5)(A) did not apply to receivers, then one must also conclude that § 1821(d)(6)(A) did not apply to receivers.⁶⁷ However, both the district court and the Third Circuit observed that courts "routinely treat claims against the Receiver . . . as claims within the scope of paragraph (5)."⁶⁸

The Third Circuit, continuing to follow the district court's reasoning, then explained *why* § 1821(d)(5) must apply to receivers as well as failed depository institutions.⁶⁹ Section 1821(d)(13)(D) bars jurisdiction in a court unless the claims procedures set forth in FIRREA are exhausted, and this bar applies to both depository institutions *and* receivers.⁷⁰ Thus, unless § 1821(d)(5) also applied to receivers, there would be no mechanism to review claims against the receiver.⁷¹ Moreover, if § 1821(d)(5)(A) did

65. *Hudson United Bank*, 43 F.3d at 847. The court noted with approval that the district court followed the approach of *Rosa v. Resolution Trust Corp.*, 938 F.2d 383 (3d Cir.), *cert. denied*, 502 U.S. 981 (1991). The court in *Rosa* faced the task of interpreting § 1821(d)(13)(D), which prevents a court from asserting jurisdiction over § 1821 claims until a party exhausts FIRREA's claims procedures. *Hudson United Bank*, 43 F.3d at 847. The court in *Rosa* looked to § 1821(d)(13)(D)(i) to guide them in interpreting § 1821(d)(13)(D)(ii). *See id.* at 391-92 (reading two sections together and holding that § 1821(d)(13)(D) does not apply to "pre-takeover" institutions).

66. *Hudson United Bank*, 43 F.3d at 848-49.

67. *See Hudson United Bank v. Chase Manhattan Bank*, 832 F. Supp. 881, 886 (D.N.J. 1993) ("If [a court] were to read these paragraphs literally . . . [a court] would have to exempt claims against the Receiver not only from paragraph (6)(A), but also from administrative review under paragraph (5).").

68. *Id.*; *Hudson United Bank*, 43 F.3d at 848. Both the district court and the Third Circuit cited the following as standing for the proposition that claims against the receiver are within the scope of FIRREA's claims procedures: *Althouse v. Resolution Trust Corp.*, 969 F.2d 1544, 1545-46 (3d Cir. 1992); *Praxis Properties, Inc. v. Colonial Sav. Bank*, 947 F.2d 49, 62-64 (3d Cir. 1991); *Rosa*, 938 F.2d at 395-96.

69. *Hudson United Bank*, 43 F.3d at 848-49.

70. 12 U.S.C. § 1821(d)(13)(D) (Supp. V 1993); *see Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 484 (8th Cir. 1993) (noting that language indicates court shall not have jurisdiction until claims procedures are exhausted); *Henderson v. Bank of New England*, 986 F.2d 319, 320 (9th Cir. 1993) (same), *cert. denied*, 114 S. Ct. 559 (1993); *Office and Professional Employees Int'l Union Local 2 v. Federal Deposit Ins. Corp.*, 962 F.2d 63, 66 (D.C. Cir. 1992) (same); *Meliezer v. Resolution Trust Corp.*, 952 F.2d 879, 882 (5th Cir. 1992) (same); *Abbott Bldg. Corp. v. United States*, 951 F.2d 191, 194 n.3 (9th Cir. 1991) (same); *Resolution Trust Corp. v. Elman*, 949 F.2d 624, 627 (2d Cir. 1991) (same).

The statute clearly reads that a claimant is entitled to file a claim in federal court once the claimant has complied with the claims procedures, and that the federal court shall have *de novo* jurisdiction. *See Rosa*, 938 F.2d at 391 (holding that once claims procedures are exhausted, court has *de novo* jurisdiction); *Bueford*, 991 F.2d at 486 (same); *Office and Professional Employees*, 962 F.2d at 65 (same).

71. *Hudson United Bank*, 43 F.3d at 849.

not apply to receivers, "then 1821(d)(13)(D) would compel a complete bar of review of claims against the receiver because no grant of jurisdiction exists elsewhere in 1821(d)." ⁷² Consequently, an interpretation that does not apply § 1821(d)(5)(A) to receivers renders receivers immune from suit — a result Congress could not have intended. ⁷³ The Third Circuit rejected Hudson's claim that there is an implicit grant of jurisdiction against the receiver in § 1821(d)(5)(C) and § 1821(d)(6)(B), which refer to "any claims," characterizing this contention as a "strained" argument. ⁷⁴

Ultimately, the Third Circuit found that a correct reading of § 1821(d)(6)(A) requires application of the venue provision to claims against both the depository institution *and* the receiver. ⁷⁵ In reaching this holding, the court asserted that this conclusion avoids the possibility that § 1821(d)(13)(A) can "operate as an independent and outright bar of jurisdiction," and would operate as a statutory exhaustion requirement. ⁷⁶

B. Should § 1821(e) Control?

Hudson, relying on *Heno v. Federal Deposit Insurance Corp. (Heno I)*, ⁷⁷ next argued that § 1821(d) is inappropriate for breach of contract actions

72. *Id.* at 848.

73. *Id.* at 848-49. The district court observed:

Logic dictates that the claims barred by paragraph (13)(D) must coincide with those that may be filed under the administrative procedures of paragraph (5). Otherwise, paragraphs (5) and 13(D) would bar relief in the district court without providing relief elsewhere, and FIRREA would become a source of immunity for the Receiver . . . Congress intended for FIRREA to channel claims through the administrative process . . . not to immunize the Receiver.

Hudson United Bank v. Chase Manhattan Bank, 832 F. Supp. 881, 886 (D.N.J. 1993) (citations omitted); *see Rosa*, 938 F.2d at 396 ("The primary purpose underlying FIRREA's exhaustion scheme is to allow [the receiver] to perform its statutory function of promptly determining claims so as to quickly and efficiently resolve claims against a failed institution without resorting to litigation.").

74. *Hudson United Bank*, 43 F.3d at 849.

75. *Id.*

76. *Id.* at 850. In *National Union Fire Insurance Co. of Pittsburgh v. City Savings F.S.B.*, 28 F.3d 376 (3d Cir. 1994), the Third Circuit noted that § 1821(d)(13)(D) refers to "any actions," whereas § 1821(d)(5)(A) refers to "claims". *Id.* The question raised and left unresolved in *National Union* was whether "claims" referred only to a subset of possible actions. *Id.* at 385. If this limitation existed, then all actions not characterized as claims would consequently face a jurisdictional bar according to the language of § 1821(d)(13)(D). *Id.* The *Hudson United Bank* court decided that § 1821(d)(13)(D) and § 1821(d)(5) have concurrent scope. *Hudson United Bank*, 43 F.3d at 849-50.

77. *Heno v. Federal Deposit Ins. Corp.*, 996 F.2d 429 (1st Cir. 1993) [hereinafter *Heno I*], *rev'd*, 20 F.3d 1204 (1st Cir. 1994). In *Heno I*, the FDIC repudiated the plaintiff's contract after the claims filing period of § 1821(d) elapsed. *Id.* at 431. Under § 1821(d)(13)(D), no court could assert jurisdiction until administrative review occurred and in this case the injured party could no longer file a claim to obtain administrative review. *Id.* The court held that because Congress did not intend to apply the administrative review procedures under § 1821(d) to preclude review of post-receivership claims arising after the 90-day period, the "reasonable

and that § 1821(e) properly controls.⁷⁸ In *Heno I*, the United States Court of Appeals for the First Circuit applied the § 1821(e) time bar in determining that the § 1821(d) time bar would be unfair.⁷⁹ However, the court withdrew *Heno I* when the FDIC persuaded the court that its internal agency manual procedures would allow it to review Heno's claims even though Heno missed the ninety-day time limit.⁸⁰ In *Heno II*, the court found that resorting to § 1821(e) in post-receivership claims against the receiver is unnecessary.⁸¹

Hudson, nevertheless, still wished to rely on *Heno I*.⁸² However, the Third Circuit observed that if the holding of *Heno I* rested on the agency's refusal to review Heno's claims, then the holding is inapposite here because the FDIC heard and rejected Hudson's claim.⁸³ Moreover, if the holding in *Heno I* rested on the notion that contract claims against the receiver are not subject to administrative review, then the holding is inconsistent with both *Heno II* and *Rosa v. Resolution Trust Corp.*⁸⁴

period" deadline of § 1821(e) would apply. *Id.* at 432-34. "Congress decided not to superimpose on the subsection 1821(e) contract repudiation process the fixed deadlines made applicable under subsection 1821(d)." *Id.* at 434.

78. *Hudson United Bank*, 43 F.3d at 850.

79. *Id.* 12 U.S.C. § 1821(d)(3)(B) reads, in relevant part:

The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall-

(i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice *which shall be not less than 90 days after the publication of such notice*

12 U.S.C. § 1821(d)(3)(B) (Supp. V 1993) (emphasis added).

80. *Heno v. Federal Deposit Ins. Corp.*, 20 F.3d 1204 (1st Cir. 1994) [hereinafter *Heno II*]. The court in *Heno II* deferred to the FDIC's interpretation that the FDIC's treatment of Heno's administrative review requests (which occurred after the 90-day time bar of § 1821(d)(3)(B)) was "tantamount to administrative review" according to its internal agency manual procedures. *Id.* at 1209-10. Thus, because Heno then technically met the statutory exhaustion requirement of § 1821(d)(13)(A), the statute did not bar Heno from filing suit in court. *Id.*

81. *Id.* at 1209-10.

82. *Hudson United Bank*, 43 F.3d at 850. Hudson's counsel relied on *Heno I* in its brief, but by the time oral arguments began, the First Circuit had decided *Heno II*. *Id.* at 850-51.

83. *Id.* at 850-51.

84. See *Heno II*, 20 F.3d at 1204 (holding that contract claims against receivers are subject to administrative review); *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 392-93 (3d Cir.), *cert. denied*, 502 U.S. 981 (1991). In *Rosa*, the Third Circuit held that "post-takeover" claims against the receiver were included within the scope of § 1821(d)(13)(A), which contains a jurisdictional bar. *Id.* at 392-93. The court declined to hold that § 1821(d) applied only to "pre-takeover" depository institutions. *Id.* Thus, this holding is consistent with the Third Circuit's rejection of the Hudson argument that breach of contract claims must be considered under § 1821(e). *Hudson United Bank*, 43 F.3d at 850-51; *cf.* *Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269 (10th Cir.), *cert. denied*, 115 S. Ct. 317 (1994). *Homeland Stores* involved a case where the receiver, after taking control of a failed S&L, breached a lease contract. *Id.* at 1270-71. The United States Court of Appeals for the Tenth Circuit held that the term "claim," as used in § 1821(d), could

C. *Are FIRREA's Claims Procedures Unconstitutional?*

Hudson also contended that the time constraints imposed by 12 U.S.C. § 1821(d)(6)(A), in combination with the cut-off date provision for the claim submission provisions of § 1821(d)(3)(B), could raise constitutional problems in certain cases.⁸⁵ The argument states: the plaintiff has a claim against a receiver due to an injury occurring after the § 1821(d)(3)(B) deadline.⁸⁶ The receiver, who under § 1821(d)(5)(C) has discretion to hear late claims, decides not to hear the claim.⁸⁷ Section 1821(d)(13)(D) would then act as a bar to judicial review because administrative review was not undertaken.⁸⁸ Thus, the injured party is left with no remedy for the alleged injury, a violation of due process.⁸⁹

not apply to a claim such as this. *Id.* at 1274. The Tenth Circuit, faced with the same dilemma as the *Heno I* court (a post-receivership claim arising after the 90-day time bar) concluded that § 1821(d) could not be read to include claims against the receiver after the receiver takes over an institution. *Id.* The Third Circuit in *Hudson United Bank* rejected the *Homeland Stores* holding and followed the reasoning it employed in *Rosa*, holding that post-receivership claims against the receiver are within the scope of § 1821(d). *Hudson United Bank*, 43 F.3d at 850; see *Resolution Trust Corp. v. Midwest Fed. Sav. Bank of Minot*, 4 F.3d 1490, 1496-97 (9th Cir. 1993) (advancing position that jurisdictional bar of § 1821(d)(13)(D) should be limited to those claims actually covered by § 1821(d)(5) and § 1821(d)(6)), *rev'd on other grounds*, 36 F.3d 785 (9th Cir. 1994); *National Trust for Historic Preservation in United States v. FDIC*, 995 F.2d 238, 240 (D.C. Cir.), *vacated*, 5 F.3d 567 (D.C. Cir. 1993), *modified*, 21 F.3d 469 (D.C. Cir.), *cert. denied*, 115 S. Ct. 683 (1994) (same); *Federal Deposit Ins. Corp. v. DiStefano*, 839 F. Supp. 110, 115-16 (D.R.I. 1993) (same); *In re Continental Fin. Resources, Inc.*, 154 B.R. 385, 387-88 (D. Mass. 1993) (same); *In re Purcell*, 150 B.R. 111, 113-16 (D. Vt. 1993) (same).

85. *Hudson United Bank*, 43 F.3d at 851. For the text of 12 U.S.C. § 1821(d)(3)(B), see *supra* note 79. For the text of § 1821(d)(6)(A), see *supra* note 6.

86. *Id.*

87. *Id.*; see 12 U.S.C. § 1821(d)(5)(C) (Supp. V 1993).

88. *Hudson United Bank*, 43 F.3d at 851; see 12 U.S.C. § 1821(d)(13)(D).

89. *Hudson United Bank*, 43 F.3d at 851. The Third Circuit, in *National Union Fire Insurance Co. v. City Savings, F.S.B.*, 28 F.3d 376 (3d Cir. 1994), recognized this potential problem. *Id.* at 389-90. The Third Circuit in *National Union* held that, because the plaintiff did not seek administrative review of his claims before seeking a declaratory judgment in federal court, the statute precluded the federal court from asserting jurisdiction over the case. *Id.* The court also contrasted the language of § 1821(d)(5) and § 1821(d)(6) with the language of § 1821(d)(13)(D), and noted that the claims referred to in § 1821(d)(13)(D) may have a broader reach than those claims referred to in § 1821(d)(6). *Id.* at 386-88. The court recognized a problem:

[W]e acknowledge that it is possible that in some factual settings the broad bar to jurisdiction contained in § 1821(d)(13)(D) could raise constitutional concerns. Such a situation could arise if the holder of an action asserting a right to payment were not provided reasonable notice and an opportunity to be heard in the administrative claims procedure. In such a setting, application of the broad jurisdictional bar, as stated above, would appear to be unconstitutional.

Hudson argued that each claim based on the acts or omissions of a receiver should proceed under § 1821(d)(5)(C) instead of § 1821(d)(6)(A).⁹⁰ The time constraints and the venue provision of § 1821(d)(6)(A) would then not apply.⁹¹ Furthermore, Hudson argued that § 1821(d)(5)(C) should be read to mandate hearing late claims, thus relieving the due process concerns raised whenever the FDIC exercises its discretion not to hear a late claim, and this exercise results in a jurisdictional bar.⁹²

The Third Circuit in *Hudson United Bank* refused to read FIRREA as suggesting the need for two separate claims procedures.⁹³ Instead, the court held that where the jurisdictional bar of § 1821(d) could not be applied constitutionally, the court would maintain jurisdiction.⁹⁴ The court felt that a single claims procedure was more consistent with their decision in *Rosa*, where the court held that “claims against the receiver . . . were subject to the ‘statutory exhaustion requirement’ of administrative review before the courts had jurisdiction over them.”⁹⁵

V. CONCLUSION

FIRREA is “awkwardly written,”⁹⁶ and Congress, perhaps in its haste to deal with a growing savings and loan crisis and the imminent collapse of many depository institutions, neglected to state explicitly whether the FIRREA’s claims procedures apply to claims against the receiver.⁹⁷ Read literally, the venue provision applies only to claims against the failed depository institution.⁹⁸

Id. at 392. *Hudson United Bank* eliminated at least one potential problem, holding that § 1821(d)(13)(D) and §§ 1821(d)(5), (d)(6) have concurrent scope. *Hudson United Bank*, 43 F.3d at 849-50.

90. *Hudson United Bank*, 43 F.3d at 851.

91. *Id.*

92. *Id.* at 850-52.

93. *Id.*; cf. *Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269 (10th Cir. 1994) (establishing different claims procedure for claims arising after receiver takes control); *Resolution Trust Corp. v. Midwest Fed. Sav. Bank of Minot*, 4 F.3d 1490 (9th Cir.) (holding that claims procedure does not apply, at least where affirmative defense is presented), *vacated*, 36 F.3d 1490 (9th Cir. 1993).

94. *Hudson United Bank*, 43 F.3d at 852.

95. *Id.* (citing *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 392-93 (3d Cir.), *cert. denied*, 502 U.S. 981 (1991)).

96. *Id.* at 849.

97. See *Marquis v. Federal Deposit Ins. Corp.*, 965 F.2d 1148 (1st Cir. 1992). The *Marquis* court found: “FIRREA’s text comprises an almost impenetrable thicket, overgrown with sections, subsections, paragraphs, subparagraphs, clauses, and subclauses — a veritable jungle of linguistic fronds and brambles. In light of its prolixity and lack of coherence, confusion over its proper interpretation is not only unsurprising — it is inevitable.” *Id.* at 1151.

98. 12 U.S.C. § 1821(d)(6)(A) (Supp. V 1993). For the text of § 1821(d)(6)(A), see *supra* note 6.

Thus, a gap exists in FIRREA. Section 1821(d)(13)(D) reads that no court shall have jurisdiction over any claim against a receiver except as provided for in § 1821(d).⁹⁹ However, § 1821(d) does not provide, at least expressly, that the claims procedures apply to claims against the receiver.¹⁰⁰ Consequently, one must then conclude that either Congress did not intend to apply the statutory exhaustion requirement of § 1821(d) to receivers, or that Congress intended to include the receiver within the language of 1821(d)(6)(A).¹⁰¹

The venue provision of FIRREA, which requires a claimant to file suit in either the district in which the depository institution was located or the District of Columbia, is designed to promote efficiency in adjudicating claims against failed depository institutions.¹⁰² Presumably, those same concerns are present when the claim is against the receiver, so that reading § 1821(d)(6)(A) to allow its application to receivers also promotes this goal of efficiency.¹⁰³

Nonetheless, one caveat remains. By holding that § 1821(d)(13)(D), § 1821(d)(5) and § 1821(d)(6) have concurrent scope, the Third Circuit precluded the possibility that a claim not subject to the claims procedures might also be barred from being heard in court.¹⁰⁴ However, where a

99. 12 U.S.C. § 1821(d)(13)(D).

100. 12 U.S.C. § 1821(d)(6)(A). For the text of § 1821(d)(6)(A); see *supra* note 6.

101. See *Hudson United Bank v. Chase Manhattan Bank*, 832 F. Supp. 881, 886 (D.N.J. 1993) ("Otherwise paragraphs (5) and (13)(D) would bar relief in the district court without providing relief elsewhere, and FIRREA would become a source of immunity for the receiver. This is not a result intended by Congress.").

102. See *Marquis v. Federal Deposit Ins. Corp.*, 965 F.2d 1148, 1154 (1st Cir. 1992) ("Faced with a national banking crisis, Congress wanted to facilitate takeovers of insolvent financial institutions and smooth the modalities by which rehabilitation might be accomplished. To this end, FIRREA was designed to create an efficient administrative protocol for processing claims against failed banks"); House Report, *supra* note 2, at 419, *reprinted in* 1989 U.S.C.C.A.N. at 215 ("The claims determination procedure . . . creates a system [that] enables the FDIC to dispose of the bulk of their claims against failed financial institutions expeditiously and fairly.").

103. See *Hudson United Bank*, 832 F. Supp. at 887 ("Congress . . . expedited the prompt resolution of lawsuits involving failed institutions by directing that the lawsuits be filed in only two locations: the institution's principal place of business or the District of Columbia Without this forum clause, the FDIC would be 'forced to defend actions at various locations throughout the country, with the attendant disruption of the Bank's records and personnel, [and] the defendant's task would become further complicated'." (quoting *TPO Inc. v. Federal Deposit Ins. Corp.*, 325 F. Supp. 663, 665 (S.D.N.Y. 1971))). Because the FDIC is conducting the business of the financial institution, it would be more efficient for the FDIC to defend claims near that place of business. *Hudson United Bank v. Chase Manhattan Bank*, 43 F.3d 843, 849 (3d Cir. 1994).

104. *Hudson United Bank*, 43 F.3d at 849-50. In *National Union Fire Insurance Co. v. City Savings, F.S.B.*, 28 F.3d 376 (3d Cir. 1994), the Third Circuit left this question open. *Id.* at 387 n.12. In *National Union*, the plaintiffs were insurance companies who instituted a declaratory judgment action, seeking to rescind insurance policies under which the receiver was seeking coverage. *Id.* at 380-81. Thus,

claim arises *after* the ninety-day time bar and the FDIC refuses to hear the claim because of a late filing, expect the Third Circuit to rule that the jurisdictional bar of § 1821(d)(13)(D) does not apply and a federal court would have jurisdiction.¹⁰⁵ Otherwise, all claims, including those arising after the receiver takes control of the failed institution, are subject to the claims procedures of § 1821(d) *and* the venue provision of § 1821(d)(6)(A).¹⁰⁶

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the case presented a *debtor's* claim asserted against the receiver. *Id.* at 385. The administrative claims procedures of § 1821(d) apply only to creditor's claims. *Id.* If § 1821(d)(13)(D) covered a class of claims larger than creditor's claims, some in that class may be denied due process. *Id.* at 385-89. For example, a debtor with a claim such as the one in *National Union* would not have reasonable notice or an opportunity to be heard in the administrative claims procedure. *Id.* at 389. Yet, they could be barred from the courts under the jurisdictional bar of § 1821(d)(13)(D). *Id.* The Third Circuit, although noting this potential constitutional violation, justified barring the declaratory judgment action under § 1821(d)(13)(D) on the grounds that it was merely a declaratory judgment action. *Id.* at 388. In *National Union*, the plaintiffs sought to determine their rights; they had not been sued by the RTC. *Id.* If the RTC decided not to sue, declaratory judgment relief would be unnecessary. *Id.* If the RTC decided to sue, then the plaintiffs could defend themselves at that time. *Id.* The Third Circuit in *Hudson United Bank* answered the open question, holding that the jurisdictional bar in § 1821(d)(13)(D) referred only to those claims that were within the scope of the claims procedures of § 1821(d). *Hudson United Bank*, 43 F.3d at 849-50. However, the Third Circuit's holding in *National Union* that claimants not within the scope of the claims procedures but seeking a *declaratory judgment* action would be subject to the jurisdictional bar was not addressed in *Hudson United Bank*, and this holding presumably still stands.

105. *Hudson United Bank*, 43 F.3d at 852 (suggesting that where jurisdictional bar could not be constitutionally applied, court would have jurisdiction to hear claim); *National Union*, 28 F.3d at 389-90 n.16, 393 n.22. Although the jurisdictional bar would not apply in such a situation, the venue provision would. Therefore, there would be no conceivable reason why a court, in disregarding the jurisdictional bar, would also disregard the venue provision. *See id.* at 392 n.22 ("Courts routinely declare particular applications of a statute unconstitutional, while leaving the statute intact.").

106. *Hudson United Bank*, 43 F.3d at 852 (stating Third Circuit's preference for single claims procedure).

